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Nos. 03-1293 & 03-1294

IN THE
Supreme Court of the United States

David Whitfield,
Petitioner,
v.
United States of America,

Haywood Eudon Hall,
Petitioner,
v.
United States of America.

On Writs of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
REPLY BRIEF FOR THE PETITIONERS 1
I. SECTION 1956(h) MERELY IMPOSES A PENALTY APPLICABLE TO MONEY LAUNDERING CASES FOR THE OFFENSE OF CONSPIRACY DEFINED IN SECTION 371. 3
II. EVEN IF SECTION 1956(h) DEFINES AN OFFENSE, AS THE GOVERNMENT CONTENDS, THAT OFFENSE INCLUDES THE ELEMENT OF AN OVERT ACT. 11
CONCLUSION 18
APPENDIX A: TEXT OF 18 U.S.C. 1956 and 1957 ..... 1a

TABLE OF AUTHORITIES

Cases

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 4
Bannon v. *United States*, 156 U.S. 464 (1895) 2
Clay v. *United States*, 537 U.S. 522 (2003) 10
Cortez Byrd Chips v. *Harbert Construction Co.*, 529 U.S. 193 (2000) 16
Duncan v. *Walker*, 533 U.S. 167 (2001) 15
Fourco Glass Co. v. *Transmirra Products Corp.*, 353 U.S. 222 (1989) 14
Hibbs v. *Winn*, 124 S. Ct. 2276 (2004) 16
Holmes v. *Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992) .. 10
Hyde v. *United States*, 225 U.S. 347 (1912) 2
Keene Corp. v. *United States*, 508 U.S. 200 (1993) 12
Leocal v. *Ashcroft*, ___ U.S. ___, No. 03-583 (Nov. 9, 2004) 13
Liparota v. *United States*, 471 U.S. 419 (1985) 12
Market Co. v. *Hoffman*, 101 U.S. 112 (1879) 15
Mercantile Nat'l Bank v. *Langdeau*, 371 U.S. 555 (1963) ... 14
Nash v. *United States*, 229 U.S. 373 (1913) 17, 18
Neder v. *United States*, 527 U.S. 1, 22-25 (1999) 10
Radzanower v. *Touche Ross & Co.*, 426 U.S. 148 (1976) 14
Ratzlaf v. *United States*, 510 U.S. 135 (1994) 16
Rewis v. *United States*, 401 U.S. 808 (1971) 12
Salinas v. *United States*, 522 U.S. 52 (1997) 17
Singer v. *United States*, 323 U.S. 338 (1945) 17, 18
United States v. *Derman*, 211 F.3d 175 (CA1 2000) 9
United States v. *Abuhouran*, 161 F.3d 206 (CA3 1998) 9
United States v. *Britton*, 108 U.S. 199 (1883) 1
United States v. *Cabrales*, 109 F.3d 471 (CA8 1997) 9
United States v. *Cabrales*, 524 U.S.1 (1998) 9, 15
United States v. *Conley*, 37 F.3d 970 (CA3 1994) 4
United States v. *Franklin*, 902 F.2d 501 (CA7 1990) 4
United States v. *Fuller*, 974 F.2d 1474 (CA5 1992) 4
United States v. *Jenkins*, 78 F.3d 1283 (CA8 1996) 9
United States v. *Johnson*, 323 U.S. 273 (1944) 14

United States v. *Piervinanzi*, 23 F.3d 670 (CA2 1994) 2
United States v. *Shabani*, 513 U.S. 10 (1994) ..... passim
United States. v. *Vargas*, 986 F.2d 35 (CA2 1993) 4

Statutes

8 U.S.C. 1101(h) 13
8 U.S.C. 1326(b) 4
15 U.S.C. 2 6
15 U.S.C. 3(b) 6
15 U.S.C. 76 6
15 U.S.C. 77 6
15 U.S.C. 1644(a) 6
15 U.S.C. 1644(b) 6
15 U.S.C. 1693n(b)(1) 6
15 U.S.C. 1693n(b)(2) 6
18 U.S.C. 16 13
18 U.S.C. 32(a)(7) 6
18 U.S.C. 37(a) 5, 6
18 U.S.C. 38(a)(3) 5, 6
18 U.S.C. 81 6
18 U.S.C. 115(a)(1)(A) 6
18 U.S.C. 115(a)(2) 6
18 U.S.C. 176a 11
18 U.S.C. 224(a) 6
18 U.S.C. 371 ..... passim
18 U.S.C. 658 1
18 U.S.C. 757 6
18 U.S.C. 799 6
18 U.S.C. 831(a)(8) 17
18 U.S.C. 930(c) 6
18 U.S.C. 956(a)(1) 17
18 U.S.C. 956(b) 17
18 U.S.C. 1028(f) 6
18 U.S.C. 1203(a) 6
18 U.S.C. 1349 6
18 U.S.C. 1362 6
18 U.S.C. 1363 6

18 U.S.C. 1368 6
18 U.S.C. 1466A(a) 6
18 U.S.C. 1466A(b) 5, 6
18 U.S.C. 1752(b) 6
18 U.S.C. 1792 6
18 U.S.C. 1951(a) 6
18 U.S.C. 1956 ..... 5, 8, 13, 16
18 U.S.C. 1956(a) 4, 5
18 U.S.C. 1956(a)(1) 6
18 U.S.C. 1956(a)(1)(B)(ii) 9
18 U.S.C. 1956(a)(2) 6
18 U.S.C. 1956(a)(3) 6
18 U.S.C. 1956(h) ..... passim
18 U.S.C. 1956(i) ..... passim
18 U.S.C. 1956(i)(1)(A) 15
18 U.S.C. 1956(i)(1)(B) 15
18 U.S.C. 1956(i)(2) 13, 15, 16
18 U.S.C. 1957 5
18 U.S.C. 1957(a) 6
18 U.S.C. 1959(a) 6
18 U.S.C. 1962(d) 17
18 U.S.C. 1993(a)(8) 6
18 U.S.C. 2251(e) 6
18 U.S.C. 2252(b)(1) 6
18 U.S.C. 2252(b)(2) 6
18 U.S.C. 2252A(b)(1) 6
18 U.S.C. 2252A(b)(2) 6
18 U.S.C. 2260(c) 6
18 U.S.C. 2280(a)(1)(H) 5, 6
18 U.S.C. 2281(a)(1)(F) 5, 6
18 U.S.C. 229(a)(2) 6
18 U.S.C. 2332(b) 6
18 U.S.C. 2332a(a) 5, 6
18 U.S.C. 2332a(b) 5, 6
18 U.S.C. 2332b(a)(2) 5, 6
18 U.S.C. 2332f(a)(2) 5, 6
18 U.S.C. 2339A(a) 5, 6

18 U.S.C. 2339B(a)(1) 6
18 U.S.C. 2339C(a)(2) 5, 6
18 U.S.C. 2423(e) 6
18 U.S.C. 3237 15
21 U.S.C. 174 11
21 U.S.C. 844(c) 6
21 U.S.C. 846 ..... passim
21 U.S.C. 963 6
21 U.S.C. 1904(c)(2) 6
28 U.S.C. 1400(a) 14
28 U.S.C. 1400(b) 14
28 U.S.C. 2244(d)(1)(A) 10
28 U.S.C. 2255 10
42 U.S.C. 2272 6
42 U.S.C. 2273 6
42 U.S.C. 2274(a) 6
42 U.S.C. 2274(b) 6
42 U.S.C. 2275 6
42 U.S.C. 2284(a) 6
42 U.S.C. 2284(b) 6
46 U.S.C. app. 835(f) 6
46 U.S.C. app. 1903(j) 6
49 U.S.C. 46502(a)(2) 6
49 U.S.C. 46504 6
49 U.S.C. 60123(b) 6
50 U.S.C. 167k 6
50 U.S.C. app. 2410(a) 6
50 U.S.C. app. 2410(b)(1) 6

Other Authorities

136 Cong. Rec. S6636 (daily ed. May 21, 1990) 8
137 Cong. Rec. S12,235 (daily ed. Aug. 2, 1991) 7, 8
138 Cong. Rec. H9802 (daily ed. Sept. 29, 1992) 7
138 Cong. Rec. S8614 (daily ed. June 23, 1992) 7
Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, 106 Stat. 4044, 4066 (1992) 5, 7

Comprehensive Deposit Insurance Reform and Tax Payer Protection Act, S. 543, 102d Cong. (1991) 7
Money Laundering Enforcement Amendments of 1991, H.R. 26, 102d Cong. § 34 (1991) 7, 8
Money Laundering Improvements Act of 1991, S. 1665, 102d Cong. § 209 (1991) 8
U.S. Const. amend. VI 15
U.S. Const. art . III, § 2, cl. 4 15
United States Department of Justice, United States Attorneys' Manual Staff, Memorandum re: Money Laundering Prosecutions and Forfeitures, Oct. 1, 1992 2

REPLY BRIEF FOR THE PETITIONERS

The central question in this case is one of congressional intent: when Congress enacted 18 U.S.C. 1956(h) to enhance the penalties for money laundering conspiracy, did it also intend, *sub silentio*, to abandon the overt act requirement that had always been an essential element of the offense? As petitioners' opening brief demonstrated, the answer to this question is "no." The legislative history, structure, text, and unique nature of the money laundering statute refute the Government's contention that Congress intended to authorize prosecutions for nothing more than mere agreements to launder money.

The overt act requirement serves a critical and unique function in money laundering conspiracy cases. Because *every* financial crime is intended to generate proceeds, and because the breadth of the money laundering laws encompasses a wide range of otherwise innocuous financial transactions, there is a real danger that *any* agreement to commit a financial crime will also constitute conspiracy to launder money in the absence of an overt act requirement. Defendants would thus face severe sentences for merely agreeing to commit financial crimes, even if they take no action toward effectuating that agreement.[1] As this Court has repeatedly noted, the overt act requirement is perfectly suited to prevent such irrational punishment for crimes when no person ever acted upon the agreement. See, *e.g.*, *United States* v. *Britton*, 108 U.S. 199, 204-05 (1883) (overt act requirement "affords a *locus poenitentice*, so that before the

[1] See, *e.g.*, Pet. Br. 26-27 (noting possibility that defendant could be prosecuted for agreeing to conceal the proceeds from selling livestock or crops pledged as security against a Farmers Home Administration Loan, even if he takes no action toward that goal and could not be prosecuted for the underlying offense (18 U.S.C. 658), conspiracy to commit that offense, or substantive money laundering).

act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute"); *Hyde* v. *United States*, 225 U.S. 347, 358 (1912) (quoting *Britton*); *Bannon* v. *United States*, 156 U.S. 464, 469 (1895) (same).

To be sure, there are instances in which Congress elects to omit any overt act requirement. Yet the Government is unable to point to *any evidence* that Congress intended to do so here or articulate *any reason* why it would have intended to do so. Petitioners' opening brief demonstrated, and the Government does not dispute, that the overt act requirement has never presented an obstacle to meritorious conspiracy prosecutions. Instead, it has served only as an essential bulwark against prosecutions in which the Government fails to offer *some* proof that the defendants have taken *some* step beyond simply agreeing to commit *some* crime that will generate proceeds. This failure to articulate any reason why Congress would have sought to remove the overt act requirement is particularly striking when (1) many of the specified unlawful activities which give rise to liability under Section 1956(h) are themselves punished with far lower sentences than those available under Section 1956(h), see Pet. Br. 24-25, and (2) the Government itself concedes that it is often difficult to distinguish between money laundering offenses and the underlying financial crimes. See, *e.g.*, *United States* v. *Piervinanzi*, 23 F.3d 670, 682 (CA2 1994) (quoting the U.S. Dep't of Justice, United States Attorneys' Manual Staff, Memorandum re: Money Laundering Prosecutions and Forfeitures, Oct. 1, 1992, for its candid acknowledgement that "where the financial and money laundering offenses are so closely connected with each other," there is a risk that there will be "no clear delineation between the underlying financial crime and the money laundering offense").

I. SECTION 1956(h) MERELY IMPOSES A PENALTY APPLICABLE TO MONEY LAUNDERING CASES FOR THE OFFENSE OF CONSPIRACY DEFINED IN SECTION 371.

The Government's principal argument for the proposition that Congress intended to abandon the preexisting overt act requirement rests on *United States* v. *Shabani*, 513 U.S. 10 (1994), and the drug conspiracy offense provision of 21 U.S.C. 846. There, the Court relied on statutory silence to conclude that Section 846 adopted the common law definition of conspiracy, and therefore did not require proof of an overt act. The Government argues that because Sections 1956(h) and 846 have similar language, the *Shabani* analysis should control. This heavy reliance on *Shabani* is superficially attractive yet misplaced.

Petitioners' principal argument is *not* that, despite *Shabani*, an overt act requirement should be read into the substantially similar language of Section 1956(h). Rather, as petitioners' opening brief explained, the overt act requirement for money laundering conspiracies arises from 18 U.S.C. 371, the general conspiracy provision that defines the *offense* of conspiracy. Section 1956(h) does not explicitly include the overt act requirement for the obvious and straightforward reason that its purpose was to set forth the *penalty* for the money laundering conspiracy offense.[2]

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[2] See, *e.g.*, Pet. Br. 7 ("Section 1956(h) was not intended to eliminate the overt act requirement that had applied to money laundering conspiracies when they were prosecuted under 18 U.S.C. 371 * * * ."); *id.* at 8 ("Congress intended to create a 'specific offense' when it enacted Section 846, rather than a 'penalty' provision as it did with Section 1956(h)."); *id.* at 11 n.8 ("Nothing in these discussions [in the legislative history] – which referred interchangeably to conspiracy statutes that contained overt act requirements and statutes that omitted them – suggests that in changing the penalties for various conspiracies, Congress also meant to change the pre-existing elements."); *id.* at 12 ("Section 1956(h) did nothing more than increase the penalty for money laundering conspiracies, and therefore does not redefine the elements of the crime * * * ."); *ibid.* (discussing *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), which held that 8 U.S.C. 1326(b) "merely dealt with penalties and did not affect the substantive elements of any crime"); *id.* at 14 ("If Congress had intended the money laundering conspiracy provision to be another substantive offense rather than simply an increased penalty provision, it would have once again amended Section 1956(a) to add a new paragraph prohibiting money laundering conspiracies."); *id.* at 14-15 ("Thus, the structure of Section 1956 demonstrates that the sole purpose of Section 1956(h) was to increase the penalty for money laundering conspiracies, not to create a substantive conspiracy offense or to otherwise alter the long-standing overt act requirement."); *id.* at 19 (distinguishing *Shabani* on the ground that "some conspiracy statutes, like Section 1956(h), were clearly passed not to change the elements of conspiracy, but to increase the available penalties").

Prior to the enactment of Section 1956(h), the Government uniformly prosecuted money laundering conspiracies under Section 371.[3] The latter statute expressly requires the Government to allege and prove an overt act, for it applies only: "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, * * * and one or more of such persons *do any act to effect the object of the conspiracy* * * *." 18 U.S.C. 371 (emphasis added). Indeed, the Government cites Section 371 as the prototypical statute under which "Congress has expressly included an overt act requirement." U.S. Br. 10-11.

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[3] In addition to the cases cited in petitioners' opening brief (at 9), see, *e.g.*, *United States* v. *Conley*, 37 F.3d 970 (CA3 1994); *United States* v. *Vargas*, 986 F.2d 35 (CA2 1993); *United States* v. *Fuller*, 974 F.2d 1474 (CA5 1992); *United States* v. *Franklin*, 902 F.2d 501 (CA7 1990).

Certainly, neither the text nor the legislative history of Section 1956(h) suggests that Congress enacted that provision to shift prosecutions away from Section 371, and Congress has never amended Section 371 to exclude money laundering cases. The Government does not contend otherwise. As petitioners' opening brief established, Congress enacted Section 1956(h) merely to enhance the penalty for conspiracy in money laundering cases. Indeed, the point is not disputed: the Government acknowledges without qualification that "the purpose of the new statute *undoubtedly* was to enhance the penalty for money laundering conspiracies * * *." U.S. Br. 20 (emphasis added). Section 371 thus imposes a maximum term of five years; under Section 1956(h), it is ten or twenty years, depending on whether the defendant conspires to violate Sections 1956 or 1957.

The Government nonetheless contends that, despite Congress's avowed purpose in enacting Section 1956(h), Congress in that provision (perhaps unwittingly) also created a free-standing money laundering conspiracy offense. All of the evidence is to the contrary, however.

Congress is aware, of course, how to denominate a statute an offense; it often does so, either by including explicit language in the text of the statute or by locating a new offense provision adjacent to other specific offenses within the statutory framework. See, *e.g.*, 18 U.S.C. 37(a) (including the conspiracy provision within a statutory subsection entitled "Offenses"); *id.* § 38(a)(3) (same); *id.* § 1466A(b) (same) ; *id.* § 2280(a)(1)(H) (same); *id.* § 2281(a)(1)(F) (same); *id.* § 2332a(a), (b) (same); *id.* § 2332b(a)(2) (same); *id.* § 2332f(a)(2) (same); *id.* § 2339A(a) (same); *id.* § 2339C(a)(2) (same).

There is, however, no such evidence that Congress intended the conspiracy provision of Section 1956(h) to establish an offense. As enacted by Congress, the title of the statute is clear: Congress expressly denominated Section 1956(h) a "penalty." See Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, 106 Stat. 4044, 4066

(1992) (entitling § 1530 "Penalty for Money Laundering Conspiracies").

Congress also set forth money laundering offenses in a separate provision, 18 U.S.C. 1956(a). That the conspiracy provision was instead placed among the procedural and jurisdictional elements of the statute shows that Congress envisioned it not as a new offense, but simply as an enhancement of the applicable penalty beyond Section 371's five-year statutory maximum. In this respect Section 1956(h)'s distinctive placement within the larger statutory scheme for offenses related to money laundering is distinguishable from almost all of the Title 18 conspiracy provisions and reflects Congress's intent to create a money laundering conspiracy penalty provision.[4]

Notably, the offense provisions set forth in 18 U.S.C. 1956(a)(1), (2) and (3), as well as 18 U.S.C. 1957(a), criminalize *attempts* to engage in money laundering separately from the crime of conspiracy. This again emphasizes the unique nature of Section 1956(h) among all criminal conspiracy provisions, because virtually every conspiracy statute that defines conspiracy as a specific offense includes an attempt provision as well.[5]

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[4] See Pet. Br. 18 n.12.

[5] See, *e.g.*, 21 U.S.C. 846 ("[a]ny person who attempts or conspires * * *"); 18 U.S.C. 32(a)(7) ("attempts or conspires to do anything * * *"); *id.* § 224(a) ("attempts to carry into effect, or conspires with any other person to * * *"); see also 15 U.S.C. 2; *id.* § 3(b); *id.* § 76; *id.* § 77; *id.* § 1644(a), (b); *id.* § 1693n(b)(1), (b)(2); 18 U.S.C. 37(a); *id.* § 38(a)(3); *id.* § 81; *id.* § 115(a)(1)(A), (a)(2); *id.* § 229(a)(2); *id.* § 757; *id.* § 799; *id.* § 930(c); *id.* § 1028(f); *id.* § 1203(a); *id.* § 1349; *id.* § 1362; *id.* § 1363; *id.* § 1368; *id.* § 1466A(a) , (b); *id.* § 1752(b); *id.* § 1792; *id.* § 1951(a); *id.* § 1959(a); *id.* § 1993(a)(8); *id.* § 2251(e); *id.* § 2252(b)(1), (b)(2); *id.* § 2252A(b)(1), (b)(2); *id.* § 2260(c); *id.* § 2280(a)(1)(H); *id.* § 2281(a)(1)(F); *id.* § 2332(b); *id.* § 2332a(a), (b); *id.* § 2332b(a)(2); *id.* § 2332f(a)(2); *id.* § 2339A(a); *id.* § 2339B(a)(1); *id.* § 2339C(a)(2); *id.* § 2423(e); 21 U.S.C. 844(c); *id.* § 963; *id.*

The conclusion that Section 1956(h) defines a penalty rather than an offense follows not only from the text and structure of the money laundering statutes, but also from the legislative and drafting history. The Government does not dispute that there is not an iota of support in either the drafting or legislative history for its assertion that Section 1956(h) established a new offense. Rather, as petitioners' opening brief demonstrated, both the Senate and the House considered several bills prior to the Annunzio-Wylie Anti-Money Laundering Act that would have similarly increased the penalty for conspiracy to commit money laundering. Pet. Br. 10-11. *Every* statement by sponsors of these bills demonstrates that they intended only to increase the *penalty*, not create a new offense. See, 137 Cong. Rec. S12,235, S12,236 (daily ed. Aug. 2, 1991) (statement by Sen. D'Amato describing his proposed provision as "rais[ing] the penalty for money laundering conspiracy from 5 years to whatever the penalty would be for the substantive offense that was the object of the conspiracy"); 138 Cong. Rec. S8614, S8622-23 (daily ed. June 23, 1992) (statement by Sen. Riegle describing language identical to Section 1956(h) captioned "Penalty for Money Laundering Conspiracies" in the Comprehensive Deposit Insurance Reform and Tax Payer Protection Act, S. 543, 102d Cong. (1991), as one of several *technical changes* to strengthen the money laundering laws). And Rep. Wylie made it clear that the purpose of his bill was the same: to increase the applicable *penalty*. See 138 Cong. Rec. H9802 (daily ed. Sept. 29, 1992) (statement by Rep. Wylie explaining that Section 1956(h) "increases the criminal penalties for money laundering conspiracies").

It was for this reason that the original House Resolution actually placed the money laundering punishment provision

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§ 1904(c)(2); 42 U.S.C. 2272; *id.* § 2273; *id.* § 2274(a), (b); *id.* § 2275; *id.* § 2284(a), (b); 46 U.S.C. app. 835(f); *id.* § 1903(j); 49 U.S.C. 46502(a)(2); *id.* § 46504; 49 U.S.C. 60123(b); 50 U.S.C. 167k; 50 U.S.C. app. 2410(a), (b)(1).

in Section 371. Representative Annunzio proposed the language that eventually became Section 1956(h) as an amendment to Section 371. See Money Laundering Enforcement Amendments of 1991, H.R. 26, 102d Cong. § 34 (1991). Section 371(c) would have provided: "Notwithstanding the maximum punishment provided in subsection (a), if the offense, the commission of which is the object of the conspiracy, is an offense under section 1956 or 1957, the person conspiring to commit such offense shall be subject to the same penalties as the penalties prescribed under such sections for the offense." *Ibid.* This language, slightly modified, was ultimately enacted as an addition to Section 1956, with no indication that its inclusion in the latter section of Title 18 would in any way change the elements of the conspiracy offense.

The Government maintains that the legislative history "demonstrates that Congress modeled Section 1956(h) on the drug conspiracy statute construed in *Shabani*," U.S. Br. 7, but it profoundly misstates the significance of that fact: the legislative history refers to the language of 21 U.S.C. 846 (the statute at issue in *Shabani*), but never in a way that indicates a congressional intent to enact a new offense rather than an enhanced penalty. To the contrary, the very provision that was the subject of the section-by-section analysis the Government cites – Section 209 of the unenacted Money Laundering Improvements Act of 1991, S. 1665, 102d Cong. § 209 (1991), see U.S. Br. 18 – is actually entitled "*Penalty* For Money Laundering Conspiracies." (emphasis added). And as noted *supra* at ", Senator D'Amato, the sponsor of that provision, argued that it was merely intended to raise the penalty for money laundering conspiracy. That view is further confirmed by Senator Biden – whom Senator D'Amato credited as the source of the proposed money laundering conspiracy provision. See 137 Cong. Rec. S12,235, S12,236 (daily ed. Aug. 2, 1991). Senator Biden argued that his original proposal was merely "a *technical amendment* to make consistent the *penalty* for money

laundering conspiracies with *penalties* for drug conspiracies, which carry the same penalty as the offense that is the object of the conspiracy." 136 Cong. Rec. S6636, S6639 (daily ed. May 21, 1990).

Finally, the Government denies that "a penalty provision in one statute can serve as a penalty provision for another without any cross-reference in the text to that effect." U.S. Br. 21-22. Put another way, the Government insists that Section 1956(h) cannot serve as a penalty for the offense defined in Section 371 unless it expressly so provides. There is simply no logical reason that this would be the case, as Section 371 is the only general conspiracy statute in Title 18. The Government's own practice also belies this assertion, for it has continued, after the passage of Section 1956(h), to charge money laundering conspiracy under Section 371. For example, the defendant in *United States* v. *Cabrales*, 524 U.S. 1 (1998), was charged with conspiracy to avoid transaction reporting requirements in violation of Sections 1956(a)(1)(B)(ii) and 371. See *United States* v. *Cabrales*, 109 F.3d 471 (CA8 1997). See also, *e.g.*, *United States* v. *Derman*, 211 F.3d 175, 178 (CA1 2000) (charging defendant with money laundering conspiracy under Section 371); *United States* v. *Abuhouran*, 161 F.3d 206, 208 (CA3 1998) (same); *United States* v. *Jenkins*, 78 F.3d 1283, 1286 (CA8 1996) (same).

If Section 1956(h) in fact abandoned the overt act element that Section 371 retains, it is hard to see why the Government would prosecute defendants under a statute that is substantially more favorable to defendants, because it imposes a *greater* burden of proof on the Government while authorizing a far *lighter* penalty. The question is: what did Congress intend? The answer would be obvious if the statute included an express cross-reference, but the ambiguity of the language as actually enacted is not sufficient to convert the statute into a free-standing criminal offense, particularly when *every* indication – from the text, the structure, the legislative

history, and the drafting history – is that Congress enacted Section 1956(h) merely to impose a higher penalty.[6]

The additional arguments raised by the Government to support its contention that Section 1956(h) is an offense provision which reverts to the common law and abandons the overt act requirement are simply unpersuasive. The Government argues that "[t]he language of Section 1956(h) clearly establishes a substantive offense" because "[i]t is undisputed that 21 U.S.C. 846 establishes a substantive offense, and Section 1956(h)'s language is identical to that of Section 846 in all material respects." U.S. Br. 21. This is a *non sequitur*: the fact that the language of Section 1956(h) *can* establish an offense does not imply that it *does* in every context. To the contrary, it is indisputable that the language of 1956(h) in certain contexts is instead read more naturally as a penalty provision. Thus, if – as was originally intended – the language appeared instead as a subdivision of the general conspiracy statute, Section 371, no one would seriously argue

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[6] On this score, the government's assertion that a penalty provision in one statute cannot incorporate another without an explicit cross-reference, U.S. Br. 22, is entirely beside the point. Petitioners' argument requires no incorporation because, as we have shown, Section 371 is indisputably the offense for which Section 1956(h) provides the penalty enhancement. But in any event, the Government is wrong to assert that there would be no basis for allowing implicit incorporation of another statutory provision. This Court has held that statutes can implicitly incorporate the meaning of both common law principles – see, *e.g.*, *Neder* v. *United States*, 527 U.S. 1 (1999) (incorporating common law requirement of materiality as an element of federal mail, wire, and bank fraud offenses); *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992) (holding that RICO's civil action provision, like those in the Sherman and Clayton Acts, implicitly incorporates common law principles of proximate cause) – and other statutory provisions – see generally, *Clay* v. *United States*, 537 U.S. 522 (2003) (holding that 28 U.S.C. 2255 implicitly incorporates 28 U.S.C. 2244(d)(1)(A)'s definition of finality for federal habeas cases).

that it defined a free-standing conspiracy offense. Instead, its reference to conspiring would incorporate the elements of the conspiracy offense – including the requirement of an overt act – set forth in the original language of Section 371, and it would establish an increased penalty.

The same point is a complete answer to the Government's contention that the more natural inference from the text of Section 1956(h) is that Congress intended to enact a substantive offense: "By choosing a text modeled on the Sherman Act and the drug conspiracy statute, Congress dispensed with the overt act requirement for money laundering conspiracies." U.S. Br. 7. Again, that does not follow. The language of Section 1956(h) can serve equally as an offense or a penalty, depending on context. In this context, it is a penalty.

II. EVEN IF SECTION 1956(h) DEFINES AN OFFENSE, AS THE GOVERNMENT CONTENDS, THAT OFFENSE INCLUDES THE ELEMENT OF AN OVERT ACT.

If this Court were to conclude, contrary to the foregoing, that Section 1956(h) itself enacts a new money laundering conspiracy offense, it would not follow that Congress intended to abandon the overt act requirement and revert to the common law definition of conspiracy. As *Shabani* itself recognized, the presumption that congressional silence reflects an intent "to adopt the common law definition of statutory terms" will control only "absent contrary indications." 513 U.S. at 13. As petitioners' opening brief demonstrated, Pet. Br. 13-17, there are several significant indications of contrary legislative intent.

First, the argument that silence indicates a continuity of interpretation, which the Government advanced in *Shabani*, see U.S. *Shabani* Reply Br. at 12, cuts in petitioners' favor. Prior to the enactment of Section 846, Congress had created other drug conspiracy statutes – 21 U.S.C. 174 and 18 U.S.C. 176a – that were held not to require proof of an overt act.

Thus, it was reasonable to infer that Congress intended Section 846 to carry forward this absence of an overt act requirement. By contrast, prior to the enactment of Section 1956(h), money laundering conspiracies had always been prosecuted under Section 371, which undeniably contains an overt act requirement. Money laundering conspiracies – in contrast to drug-related conspiracies – were never prosecuted under the common law rule. The inquiry, then, is not whether Congress, in passing Section 1956(h) intended, through silence, to add an element that was not present at common law, but rather whether Congress intended, through silence, to delete an element that was required by the predecessor statute. The Government's reliance on cases in which this Court has "held that Congress has perpetuated the common law definition of conspiracy in its criminal statutes," U.S. Br. 12, is therefore misplaced, because Section 1956(h) derives not from common law conspiracy but rather from a tradition that does require proof of an overt act.

Second, as discussed in Part I *supra*, every indication is that Congress simply intended to increase the penalty for money laundering conspiracies by enacting Section 1956(h). Congress never indicated a secondary purpose of changing the elements of the offense or easing the prosecutors' burden, and nowhere in the legislative history is there any discussion – or even the slightest mention – of removing the overt act requirement.

To be sure, Congress's purpose of increasing the penalties for money laundering conspiracy would not *inherently* preclude an ancillary intent to eliminate the overt act requirement, but were that Congress's goal there would be *some* evidence of that fact. Instead, the text and legislative history focus exclusively on punishment, with absolutely no mention of liability. Cf., *e.g.*, *Keene Corp.* v. *United States*, 508 U.S. 200 (1993) (refusing to find that the 1948 revision of the judicial code changed underlying substantive law absent a clear expression of such an intent); *Liparota* v. *United States*, 471 U.S. 419 (1985) (refusing to find that

Congress intended for food stamp fraud to be a strict liability offense given that there was no such indication in the legislative history); *Rewis* v. *United States*, 401 U.S. 808 (1971) (refusing to adopt a broad interpretation of the Travel Act given congressional silence).

Third, as petitioners' opening brief illustrated, Pet. Br. 13-15, 20-24, the text and structure of Section 1956 as a whole manifests Congress's understanding that the preexisting overt act requirement would continue to govern money laundering conspiracy prosecutions even after the adoption of Section 1956(h). The venue provision in particular reinforces this view because it expressly reflects Congress's understanding that the Government would be charging overt acts in money laundering conspiracies. See 18 U.S.C. 1956(i)(2) ("A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought * * * in any other district *where an act in furtherance of the attempt or conspiracy took place*." (emphasis added)).

The Government makes a variety of arguments regarding Section 1956(i), none of which respond to this most basic point: the enactment of Section 1956(i) is powerful evidence that Congress continued to expect the Government to be charging overt acts in money laundering conspiracy prosecutions.[7] Conspiracy venue under Section 1956(i)(2) does not lie where the agreement is reached, but instead lie for the completed substantive money laundering offense under paragraph (1) — where the financial transaction occurs or where the underlying criminal conduct generating the unlawful proceeds takes place, provided the defendant

[7] It is indeed appropriate for this Court to look to the after-enacted venue provision to inform its understanding of Section 1956(h), as illustrated by this Court's recent decision in *Leocal* v. *Ashcroft*, ___ U.S. ___, No. 03-583, slip op. at 10 (Nov. 9, 2004) (holding that the later-enacted Section 101(h) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(h), reinforced the view that 18 U.S.C. 16 did not include DUI offenses).

participates in transporting the money from that district — or in any other district where an act in furtherance of the conspiracy takes place. Thus venue is based on the loci of the financial transactions, the specified unlawful activities, or the overt acts, but not on the loci of the agreement. This is so because Congress never intended a money laundering conspiracy to exist in the absence of an overt act.

The Government claims that this omission is inconsequential because the venue provision is permissive and therefore supplements rather than supplants 18 U.S.C. 3237. But venue provisions in criminal cases must be narrowly construed. See *United States* v. *Johnson*, 323 U.S. 273, 275 (1944) ("But if the enactment reasonably permits [a narrow construction of the venue provision], such construction should be placed upon the Act. Such construction, while not required by the compulsions of Article III, § 2 of the Constitution and of the Sixth Amendment, is more consonant with the considerations of historic experience and policy which underlie those safeguards in the Constitution regarding the trial of crimes."). Such a narrowing construction of Section 1956(i) is appropriate here, because this Court has held that "may be had" and "may be instituted" establish exclusive venue provisions. In *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976), the Court explained that a statute describing where suits "may be had" specified "the precise courts in which Congress consented to have national banks subject to suit" and concluded that it reflected Congress's intention "that in those courts alone could a national bank be sued against its will." 426 U.S. at 152 (quoting *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 560 (1963)). Similarly, in *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222 (1989), this Court held that 28 U.S.C. 1400(a) and (b), which provide, respectively, that "civil actions * * * may be instituted" and "civil action[s] * * * may be brought" were the exclusive venue provisions for patent infringement cases. The word "may" thus reflects permission, rather than non-exclusive

possibility (as in "counsel, you may proceed," rather than as in "it may rain on Saturday"). Nothing in the text or legislative history of Section 1956(i) suggests that the phrase "may be had" should have a different meaning than the similar language in *Radzanower* and *Fourco Glass*.

Further, if Section 1956(i) is interpreted as a permissive and non-exclusive venue provision, then much of it is surplusage. Specifically, Section 1956(i)(2)'s reference to overt acts would be redundant beacuse, as the Government notes, U.S. Br. 26-27, in the absence of a specific provision, venue would lie where any overt act occurred – regardless of whether it was an element of the conspiracy offense. Similarly, much of Section 1956(i)(1)(A) might be surplusage, because Article III, section 2, clause 4 of the Constitution, and the Sixth Amendment, already provide for the trial of offenses in the district where the crime is committed. Indeed, even parts of Section 1956(i)(1)(B), which attempted to codify this Court's holding in *Cabrales*, might be read as surplusage in a permissive venue provision, because 18 U.S.C. 3237 already provides that offenses begun in one district and completed in another, or committed in more than one district, may be prosecuted in any district in which such offense was begun, continued, or completed. This Court should thus read Section 1956(i) as exclusive, because "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quoting *Market Co.* v. *Hoffman*, 101 U.S. 112, 115-16 (1879)).

The Government also argues that the fact that the venue provision does not define proper venue *solely* by reference to an overt act means that Congress did not foresee an overt act in every money laundering prosecution. U.S. Br. 24-25. Again, that is no answer: on the Government's view, it need *never* charge an overt act. But Section 1956(i) demonstrates that Congress did not share that understanding. And, moreover, the language to which the Government refers – that

a prosecution "may be brought in the district in which venue would lie for the completed offense," 18 U.S.C. 1956(i)(2) – simply cannot bear the weight the Government puts on it: namely, that venue is appropriate in a district where conspirators contemplate committing an underlying offense even if they take absolutely *no* steps (i.e., commit no overt act) toward completing any crime at all. This is so because the following clause reads, "or in any *other* district where an act in furtherance of the attempt or conspiracy took place." *Ibid.* (emphasis added). Congress would not have used the term "other" to refer to the "act in furtherance" unless it also understood the preceding clause to require an overt act.

Petitioners agree with the Government that when Congress enacted Section 1956(i)(2) it was well established that at common law, venue could lie where the agreement was formed or where an act in furtherance was committed, but this venue principle was not unique to money laundering conspiracies. If the only reason Congress incorporated the overt act element into Section 1956(i) was because it perceived a need to codify this general principle of common law conspiracy venue, it would have done so in a manner that applied to all of the conspiracy provisions found in Title 18 that rely on the common law. Surely the Government is not arguing that Section 1956(h) is the only conspiracy statute that relies on the common law. Yet, 18 U.S.C. 1956 is the only criminal statute with a conspiracy subsection and a venue provision that explicitly incorporates the overt act requirement.

The Government's further argument that there is overt act language in other conspiracy statutes, see U.S. Br. 23, does not prove that Congress meant to eliminate the overt act requirement in money laundering conspiracy cases. Each of these conspiracy provisions must be interpreted within the context of its statutory scheme and legislative history. Cf. *Hibbs* v. *Winn*, 124 S. Ct. 2276 (2004) (requiring that the word "assessment" be read in context because a phrase gathers meaning from the words around it); *Cortez Byrd*

Chips v. *Harbert Construction Co.*, 529 U.S. 193 (2000) (adopting a similar approach with respect to venue statutes); *Ratzlaf* v. *United States*, 510 U.S. 135 (1994) (adopting a similar approach with respect to interpreting the term "willful"). The vast majority of the statutes in which Congress expressly included an overt act requirement differ from Section 1956(h) in a critical respect: they were enacted contemporaneously with the enactment of a new statutory offense. See, *e.g.*, 18 U.S.C. 831(a)(8) (conspiracy involving transactions with nuclear materials); *id.* § 956(a)(1), (b) (conspiracy to kill, kidnap, maim, or injure in foreign country); *id.* § 1511(a) (conspiracy to obstruct state or local law enforcement). The overt act language in these statutes was necessary because as new offenses there was not an established practice of previously prosecuting these conspiracies pursuant to Section 371 and requiring the commission of an overt act.

Lastly, the Government's stare decisis argument would have far more force if there really were a "long line" of controlling cases interpreting a structurally ambiguous conspiracy subsection, but there is not. Aside from *Shabani*, *supra*, only three decisions by this Court touch upon the overt act question, and each is properly distinguished. See Pet. Br. 17-23. In *Nash* v. *United States*, 229 U.S. 373 (1913), *Singer* v. *United States*, 323 U.S. 338 (1945), and *Salinas* v. *United States*, 522 U.S. 52 (1997), the Court confronted provisions that – in square contrast to Section 1956(i) – clearly addressed the definition of the criminal offense, and the defendants in those cases were unable to muster any evidence of congressional intent that overcame the common law presumption.

In *Singer*, *supra*, the specific question was not whether the conspiracy offense required the commission of an overt act but whether the conspiracy charged in the indictment constituted an offense under section 11 of the Selective Training and Service Act of 1940. The answer turned on whether "or conspires to do so" referred to all the offenses

covered by the act or was limited to the offense immediately preceding the "or conspires to do so" language. Similarly, in *Salinas*, *supra*, the question was not whether the RICO conspiracy provision, 18 U.S.C. 1962(d), required the commission of an overt act, but rather, whether the RICO conspiracy statute required proof that the defendant agreed personally to commit two predicate acts of racketeering. In dicta, the court observed that the RICO statute did not require commission of an overt act, but that was not the issue in contention nor was the point argued by Salinas or his codefendant.

Petitioners do not contend that *Nash* and *Singer* are irrelevant because they are old. Contra U.S. Br. 20. Rather, they are properly distinguished because (1) there is no evidence in the legislative history that Congress ever considered or relied on the analysis in either case and (2) because Congress enacted Section 1956(h) before this Court's decision in *Shabani*, it could not have foreseen that this Court would later create a "formulary" based on *Nash* and *Singer* for distinguishing overt act conspiracies from common law conspiracies. The question in this case, therefore, is not whether Congress would *today* understand that failure to include an express overt act requirement in an unambiguous specific offense conspiracy statute would lead courts to require proof of an overt act, but whether the Congress that enacted Section 1956(h) manifested any intention to abandon the overt act requirement.

CONCLUSION

For the reasons stated above and in petitioners' opening brief, the judgment of the Eleventh Circuit should be reversed.

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APPENDIX A: TEXT OF 18 U.S.C. 1956 and 1957

18 U.S.C. 1956 (West Supp. 2004)

§ 1956 Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in

the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent--

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Penalties.--

(1) In general.--Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of--

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

(2) Jurisdiction over foreign persons.--For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against

whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and--

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets.--A court described in paragraph (2) may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver.--

(A) In general.--A court described in paragraph (2) may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) Appointment and authority.--A Federal Receiver described in subparagraph (A)--

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant--

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section--

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or

foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" includes--

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1[1] of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means--

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving--

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978))[2] ;

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[1] So in original. Probably should read "section 1(b)".

[2] So in original. The second closing parenthesis probably should not appear.

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving--

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774); or

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541

(relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 922(1) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006[3] (relating to fraudulent Federal credit institution entries), 1007[3] (relating to fraudulent Federal Deposit Insurance transactions), 1014[3] (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032[3] (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnapping [sic]), section 1203 (relating to

[3] So in original. Probably should be preceded by "section".

hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), or section 2339A or 2339B (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 [7 U.S.C.A. § 2024] (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 [42 U.S.C.A. § 1490s(a)(1)] (relating to equity skimming), any felony violation of the Foreign Agents

Registration Act of 1938, or any felony violation of the Foreign Corrupt Practices Act;

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or

(F) any act or activity constituting an offense involving a Federal health care offense;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement

Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if--

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions.--If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue.--(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in--

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the

proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

18 U.S.C. 1957 (2000)

§ 1957 Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the

amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are--

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General.

(f) As used in this section--

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument

(as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.